

The Administrative Law Judge found claimant had a 14.5 percent functional impairment and limited the permanent partial disability award to that percentage. Claimant argues for a period of work disability between the January 27, 1997 date she lost her job with respondent and August 14, 1997 when claimant found comparable wage employment. The Administrative Law Judge refused to consider awarding a work disability when that period of disability is “temporary.” Finding “that the temporary level of disability which the Claimant suffered no longer exists” the ALJ held “an award is calculated using the latest

disability rate. This Court has always utilized this analysis in determining the proper nature and extent of the claimant's disability."

Claimant also contends the ALJ erred in determining her average weekly wage.

Respondent, on the other hand, contends the Award should be affirmed.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record and considering the arguments, the Appeals Board finds the Award should be modified. The Board generally agrees with the findings by the ALJ but disagrees with the ALJ's analysis concerning the calculation of an award when there is a period of work disability that is then reduced to the percentage of functional impairment based upon the conclusive rule in K.S.A. 44-510e¹ that limits awards to the percentage of functional impairment when claimant has returned to earning a comparable wage. Under the Appeals Board's award calculation formula, a change in disability percentage results in a recalculation of the award using the new percentage. This becomes, in effect, a new ceiling on benefits because a credit is given for all weeks previously paid under the prior permanent partial disability percentage or percentages. But the ALJ and respondent misunderstand the formula if they believe a change in disability means no payment is made for the prior period of disability, or that only the last disability percentage is used to calculate all benefits. Sometimes it works out that way mathematically, but that is not and never has been the Board's policy.²

The ALJ's Award should be modified to award a period of work disability because, in this case, it would affect the amount of benefits paid. As claimant was unemployed but making a good faith effort to find appropriate employment, she is entitled to a wage loss based upon her actual earnings.³ This would be 100 percent while unemployed and thus earning no wages. Also, the Appeals Board finds a 44 percent tasks loss based upon the 60 percent opinion by Dr. Peter V. Bieri and the 29 percent opinion by Dr. Vito J. Carabetta.

¹ "An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury." K.S.A. 44-510e(a).

² See Edwards v. Klein Tools, Inc., 25 Kan. App. 2d 879, 974 P.2d 609 (1999); Wheeler v. Boeing Co., 25 Kan. App. 2d 632, 967 P.2d 1085 (1998), *petition for rev. denied* (1999); and Bohanan v. U.S.D. No. 260, 24 Kan. App. 2d 362, 947 P.2d 440 (1997). See also Ullum v. Sedan Limestone Co., Inc., Appeals Board Docket No. 195,076 (August 1997) and Ridder v. Topeka Truck Plaza, Inc., Appeals Board Docket No. 177,364 (July 1997).

³ Lowmaster v. Modine Manufacturing Co., 25 Kan. App. 2d 215, 962 P.2d 1100, *petition for rev. denied* (1998) and Copeland v. Johnson Group, Inc., 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award entered by Administrative Law Judge Jon L. Frobish dated April 6, 1998 should be, and is hereby, modified to award a 72% work disability based upon a 100% wage loss and 44% tasks loss for the period beginning January 28, 1997 and ending August 13, 1997, but is otherwise affirmed.

WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Liese E. Hill, and against the respondent, C. R. Anthony Company, and its insurance carrier, CIGNA, for an accidental injury which occurred March 11, 1994, and based upon an average weekly wage of \$135.23 for 11.43 weeks of temporary total disability compensation at the rate of \$90.16 per week or \$1,030.53, followed by 60.18 weeks for the period through January 27, 1997, at the rate of \$90.16 per week or \$5,425.83, for a 14.5% permanent partial functional disability. For the 28.29-week period beginning January 28, 1997 and ending August 13, 1997, claimant is entitled to permanent partial disability compensation at the rate of \$90.16 per week, or \$2,550.63, for a 72% permanent partial work disability. Thereafter beginning August 14, 1997, claimant's permanent partial disability award is again 14.5%, for a maximum of 60.18 weeks ($415 \text{ weeks} \times 14.5\% = 60.18$). Giving a credit for the weeks of permanent partial disability compensation already paid, there is no additional sum due or owing for this latest period of disability. The award is \$9,006.99 which is all past due and ordered paid in one lump sum minus amounts previously paid.

IT IS SO ORDERED.

Dated this ____ day of June 1999.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Michael G. Patton, Emporia, KS
Richard J. Liby, Wichita, KS
Jon L. Frobish, Administrative Law Judge
Philip S. Harness, Director